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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 30 2006

EAC 00 099 50047

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the employment-based immigrant visa petition. Subsequently, the director determined that disqualifying circumstances had arisen. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner originally based his petition on his research in physical chemistry. The petitioner asserted that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director revoked the approval of the petition because the petitioner has begun working in a field unrelated to physical chemistry.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional

> ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of Job Offer.
>
> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

On February 11, 2000, the petitioner filed the petition. At the time of filing, the petitioner was studying for a Ph.D. in physical chemistry at New York University (NYU). As required, the petitioner submitted Form

ETA-750B, Statement of Qualifications, with the petition. On this form, under "Occupation in which Alien is Seeking Work," the petitioner wrote "Physical Chemistry." In a statement accompanying the initial filing, counsel stated:

> [The petitioner is an] outstanding physical chemist who has made important seminal contributions to the theory of optical properties of solids, in particular to the understanding of the non-linear optical properties of materials. [The petitioner's] research discoveries are critical to the deeper understanding and improvement of lasers and laser crystals. [The petitioner] has also made other independent research contributions to the understanding of the mathematical basis of nonlinear optical response theory.

Seven witness letters accompanied the initial filing. Several of these letters contained some discussion of mathematics and computational modeling. For example, Professor Fanghua Lin of the Courant Institute of Mathematical Sciences at NYU stated the petitioner's "research is closely connected with advanced mathematics. Modern physical chemistry utilizes mathematical modeling techniques in order to derive complex formulae which accurately describe phenomena in the physical world." Prof. Lin stated that the petitioner's "formidable command of advanced mathematics has given him the tools to develop models that are more accurate than those that have previously been accepted as the standard in the field."

On August 25, 2000, the director issued a request for evidence, indicating that the initial submission was not sufficient to establish the petitioner's eligibility for the waiver. In response, the petitioner submitted several additional witness letters and other materials. This second group of letters indicates that the petitioner's "methods have had a considerable impact on our understanding of the physics of surfaces." The new letters mention the petitioner's mathematical skills not in their own right, but in the context of how those skills allow the petitioner to make important scientific contributions. Counsel stated, at that time, that the evidence shows the petitioner to be "a brilliant scientist who has made fundamental and seminal contributions to more than one distinct areas of chemical physics."

On November 27, 2000, the director approved the petition. On March 9, 2001, the petitioner applied for adjustment to permanent resident status. On March 26, 2002, in furtherance of the adjustment application, the director instructed the petitioner to: "Submit an original letter on company letterhead from your prospective employer . . . stating their continued interest in hiring you, duties to be performed, and remuneration." In response, the petitioner has submitted a letter from payroll analyst [redacted] of Bloomberg LP, indicating that Bloomberg hired the petitioner on June 25, 2001, and that the petitioner "currently holds the position of Software Developer in our Research & Development department." [redacted] indicates that the petitioner's duties "are data analysis and calculations, applying his background in mathematics and in computer programming."

On February 5, 2004, the director issued a notice of intent to revoke, stating: "You were approved for a National Interest Waiver as a physical chemist, but you are trying to adjust status as a software developer. Please submit evidence that you are working as a physical chemist." In response to this notice, counsel states "we are submitting evidence that [the petitioner] is still doing groundbreaking research as a physical chemist. We are also submitting evidence that his position at Bloomberg's, Inc. [*sic*] is an occupation of national

impact that requires his expertise in advanced computational mathematics and modeling, which is a central aspect of his expertise as a physical chemist."

Counsel observes that, because the petitioner received a waiver of the job offer requirement, the approval rests not on a specific job, but rather on the petitioner's "special expertise." Counsel contends that the petitioner "still possesses and uses his special expertise, both at NYU's Department of Chemistry, and at Bloomberg's, Inc." The director did not cite the absence of a specific job offer from a particular employer as a basis for the notice of intent to revoke. Rather, the director issued the notice because the job that the petitioner holds is not in the field in which he had previously claimed to seek employment.

Professor [redacted] who supervised the petitioner's doctoral studies at NYU, states:

> Since obtaining his Ph.D. degree, [the petitioner] has worked in Bloomberg L.P. However, his dedication to science remained strong, and [the petitioner] has continued his research in physical and theoretical chemistry, in collaboration with the members of my group. His work with me remains at the forefront of the field. . . .
>
> Since his graduation, [the petitioner] has at all times remained my valued co-worker, and I count on him to make further significant contributions to our efforts for the foreseeable future. For this purpose, [the petitioner] has accounts on all major computers used by my group, as well as his desk and a terminal/PC in the graduate students' office. We are presently collaborating actively, and productively, on several research topics; a couple of manuscripts are in preparation, describing primarily his results.

Prof. Bačić identifies three published articles that he co-authored with the petitioner, and he asserts that these "papers are a clear evidence of [the petitioner's] ongoing state-of-the-art research in computational physical chemistry." [redacted] does not indicate how much time the petitioner devotes to this ongoing collaboration, nor does [redacted] state that the petitioner receives any remuneration whatsoever for this work. Counsel refers to NYU as the petitioner's "previous employer," further indicating that the petitioner's continued efforts at NYU do not amount to employment.

[redacted], human resources representative at Bloomberg, states:

> [The petitioner] is one of the mathematicians and computational scientists employed by this company as software developers in our Research and Development department, whose tasks involve the fundamental or core development of our economical statistical systems. His group develops programs that process the actual information and provide research tools for U.S. and global economics statistical data. . . . They also provide Treasury and Money Markets information for the U.S. and other countries, and currently provide and are working on the analytics for the London Metal Exchange, global energy markets. . . .
>
> [The petitioner] is developing a new tool to control the storage of market economics and index data. These tools will be applied to predicting economical statistical data based on

> history information. The design of such system requires that the programmer have the independent research capabilities and problem solving skills, knowledge of algorithm design, scientific computing as well as the programming skills. . . .
>
> Bloomberg hires many Ph.D. and M.S. degree holders in Computer Science, Economics, Physics, Mathematics, and Chemistry, as well as other research fields. [The petitioner] is one of them. . . .
>
> [The petitioner] was recruited for the position he holds precisely because of the programming and problem-solving skills that he learned and developed in his doctoral research in computational physical chemistry. Now, as mentioned in our previous letter to you, [the petitioner] applies the same skill set of mathematics, computer programming and problem solving capabilities to describe and analyze global financial markets. . . .
>
> We therefore believe that [the petitioner's] immigration petition and national interest waiver should remain valid because of the strong nexus between his field of expertise and his current work.

By the above logic, numerous aliens can apply for national interest waivers based not on their shared skills in mathematics and computation, but on their contributions to physics, chemistry, and other fields, and then, having obtained waivers, all of these individuals can become software developers in the financial industry.

On June 16, 2005, the director revoked the approval of the petition, stating:

> You have not explained sufficiently how your work exploits physical chemistry, uncovers fundamental scientific principles of physical chemistry, or contributes [a] significant amount of research. Even if you engage in research, it does not appear that such research will relate to the fields that will be representative of greatest benefits to the national interest. . . .
>
> Now that you have been offered permanent employment, it appears that the United States employer could apply for a labor certification for you and file a new petition on your behalf. The evidence currently available to the Service indicates that a waiver of the labor certification requirement is neither in the national interest nor the only available means for you to remain employed by Bloomberg.

Counsel, on appeal, asserts that the grounds for revocation are "arbitrary and unreasonable, and they depart from established precedent." Counsel states that the director failed to consider that the petitioner's current position at Bloomberg relies on the same "computational expertise central to [the petitioner's] training in chemical physics." The waiver, however, did not rest on the petitioner's "training" but rather on the use to which he was putting that training. Prior to the approval of the petition, this same attorney repeatedly emphasized the impact of the petitioner's work within the fields of physics and chemistry, rather than the more general value of the petitioner's expertise in computers and mathematics. Witness letters in the petitioner's initial submission contained a fair amount of discussion of the petitioner's mathematical and

computer skills, but the director found that initial submission to be insufficient. Only after the petitioner provided more specific evidence about the value of the petitioner's work *as a physical chemist* did the director find that the petitioner had met his burden of proof. Given this documented history of the proceeding, it is clear that the director approved the petition not because of the petitioner's math and computer skills, but because the petitioner was said to be making important contributions to the disciplines of physics and chemistry.

Counsel asserts that the director failed to consider earlier statement that there is a "strong nexus between his field of expertise and his current work." The "nexus" in question is simply that the positions of physical chemist and software development involve overlapping skill sets. It does not follow from this overlap that the two positions are the same or similar for national interest purposes.

Counsel appears to suggest (but does not expressly argue) that the petitioner's new employment meets the requirements of section 106 of the American Competitiveness in the Twenty-First Century Act (AC21), Public Law 106-313. Section 106(c) of AC21, establishing section 204(j) of the Act, states:

> A petition under subsection (a)(1)(D) [since re-designated section 204(a)(1)(F) of the Act] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 204(a)(1)(F) of the Act states: "Any employer desiring and intending to employ within the United States an alien entitled to classification under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) may file a petition with the Attorney General for such classification." (This authority now rests with the Secretary of Homeland Security rather than the Attorney General.)

In this instance, the stated ground for revocation is not the petitioner's change of employers, but, rather, that he is no longer employed in the same or similar occupational classification that served as the basis for the national interest waiver.

The labor certification or approval of a Form I-140 employment-based immigrant petition shall remain valid when an alien changes jobs, if: (1) a Form I-485, Application to Adjust Status, on the basis of the employment-based immigrant petition has been filed and remained unadjudicated for 180 days or more; and (2) the new job is in the same or similar occupational classification as the job for which the certification or approval was initially made. Here, the petitioner is no longer employed in the research field (physical chemistry) in which he initially proposed that his employment would substantially benefit prospectively the national interest of the United States.

In a letter dated June 22, 2005, [redacted] repeats the assertion that the petitioner "has continued to conduct first-rate research in physical and theoretical chemistry. [redacted] adds: "I fail to see how it can possibly be in it's the best interest [*sic*] to force him to leave now." This latter passage reflects the mistaken presumption that the petitioner's only way to remain in the United States is through the petition approved in 2000. A job

offer from Bloomberg could presumably form the basis of a labor certification. In the alternative, if the petitioner or Bloomberg believes that the petitioner's present work merits a waiver in its own right, the proper course of action would be to file a new petition based on that work.

In a personal statement, the petitioner requests oral argument and asserts: "To my understanding, I didn't deviate from my original NIW category all those years," because he has continued to publish articles in physical chemistry. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the petitioner identified no unique factors or issues of law to be resolved, and set forth no specific reasons why oral argument should be held except the assertion that "there were some misunderstandings and miscommunications that should be cleared in person." Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

In a supplement to the appeal, counsel effectively abandons the strategy of arguing that the petitioner's work at Bloomberg is related to physical chemistry; counsel never mentions the petitioner's job at Bloomberg in the latest submission. Counsel states "the only issue on appeal is whether the petitioner continues to be active in his field. The petition was revoked because it was alleged that the petitioner was no longer continuing to do work in the same field in which he was originally approved for national interest waiver."

The petitioner submits several letters from researchers who assert that the petitioner continues to be an active researcher in the field of physical chemistry. They assert that the petitioner's research in physical chemistry benefits the national interest. The AAO does not dispute this assertion; the director did, after all, originally approve the petition on that very basis. The authors of the latest round of letters have impeccable scientific credentials; one is a Nobel Laureate, and another is a winner of the National Medal of Science. Not coincidentally, these witnesses are all employed at academic research institutions rather than in the financial services industry. Their continued research is inextricably bound up with their careers; they cannot cease one without ceasing the other. In contrast, the petitioner could stop conducting research in physical chemistry tomorrow with no direct effect on his employment at Bloomberg. If, on the other hand, the petitioner continues to collaborate with Prof. Bačić but stops performing computer work relating to finance, it seems safe to say that Bloomberg would not long continue to pay his salary. Counsel thus attempts to portray the petitioner as being "active in the field" in a manner that is completely divorced from his employment.

The petitioner seeks an immigrant classification that the statute, at section 203(b) of the Act, specifically terms "employment-based." The waiver is not universally available to all aliens; it is restricted to certain categories that, in turn, are defined by occupation. The waiver is, therefore, inseparably linked to employment. Unpaid research that the petitioner conducts in his spare time is not, by any reasonable definition, "employment." The AAO will not speculate on what the director would have done if, after receiving the notice of intent to revoke, the petitioner had secured employment as a physical chemist. As it is, the petitioner has been either unwilling or unable to secure employment in the field of physical chemistry, despite having made what several witnesses have described as a series of important contributions to that field. The petitioner has never been employed in the field of physical chemistry except in positions ancillary to

graduate study. The record is, therefore, devoid of evidence to suggest that the petitioner seeks employment as a physical chemist, or that NYU or any other entity intends to employ him in that capacity. Third-party assurances that the petitioner will continue performing research as what essentially amounts to a hobby cannot suffice as a basis for permanent immigration benefits. The petitioner received a national interest waiver based on a fairly narrow set of circumstances. When he applied for the waiver, the petitioner gave no indication that he intended to work in finance, while volunteering with his former professor at NYU.

We find that, because the national interest waiver pertains to an employment-based classification, the factors underlying the waiver claim must pertain directly to the alien's employment. Because the petitioner's national interest waiver claim was predicated on the scientific benefits from his employment as a physical chemist, we find that the director acted correctly in revoking the approval of the petition once it became clear that the petitioner had ceased to be employed in the field of physical chemistry.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.